

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

FLEMING AUSTIN PAYTON,

Defendant-Appellant.

UNPUBLISHED
December 1, 2000

No. 213258
Genesee Circuit Court
LC No. 97-001035-FH

Before: Jansen, P.J., and Doctoroff and O'Connell, JJ.

PER CURIAM.

After a jury trial, defendant was convicted of assault with intent to do great bodily harm less than murder, MCL 750.84; MSA 28.279. He was sentenced as a second habitual offender, MCL 769.10; MSA 28.1082, to a term of ten to fifteen years' imprisonment. He appeals as of right. We affirm.

Defendant first argues that the trial court abused its discretion when it allowed Lieutenant Lock to testify regarding a statement that defendant made, without the presence of counsel, after submitting to a polygraph examination. Because defendant did not move to suppress his statement below, or object to its admission at trial, appellate relief is precluded absent a showing of plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). A plain error is an error that was clear or obvious. *Id.* at 763. Here, any error in the admission of Lock's testimony regarding the statements defendant made after the polygraph examination was not revealed until after the *Ginther* hearing established a factual record regarding the circumstances surrounding the giving of the statements. Thus, any error in the admission of Lock's testimony was not "plain" at the time the testimony was admitted. Nor has defendant shown, in light of the other evidence presented, that the alleged error affected his substantial rights, i.e., that the error affected the outcome of the proceedings. *Id.*

Defendant further contends that he was denied the effective assistance of counsel because defense counsel did not move to suppress the statements made to Officer Lock following the polygraph examination. We disagree. To establish a claim of ineffective assistance of counsel, a defendant must show that counsel's performance fell below an objective standard of reasonableness, and that the representation prejudiced the defendant to the extent that it denied him a fair trial. *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000); *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994). To demonstrate prejudice, the defendant must

show that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different. *Toma*, supra at 302-303; *People v Stanaway*, 446 Mich 643, 687-688; 521 NW2d 557 (1994). Defendant must overcome a strong presumption that counsel's assistance constituted sound trial strategy. *Toma*, supra at 302; *Stanaway*, supra at 687.

Contrary to the trial court's conclusion at the post-trial hearing on remand from this Court, we are not convinced that the totality of the circumstances demonstrate that defendant knowingly and voluntarily waived his right to have an attorney present during questioning after the polygraph examination was concluded. While defendant knowingly and voluntarily waived his *Miranda*¹ rights before the polygraph examination, no separate warnings were given before further questioning after the polygraph examination was concluded. We find the instant case to be distinguishable from *People v Ray*, 431 Mich 260, 273-278; 430 NW2d 626 (1988), in which our Supreme Court concluded that, under the circumstances of that case, it was not necessary to rewarn the defendant of his constitutional rights before questioning him immediately after the polygraph examination. Unlike the situation in *Ray*, Officer Lock did not specifically inform defendant that anything he might say after the polygraph examination could be used against him, nor did defendant sign a waiver that expressly extended to a post-examination interview. *Id.* at 277. Further, unlike *Ray*, counsel was not present when defendant was advised of his *Miranda* rights before taking the polygraph examination and counsel was not available to confer with defendant at the police station. *Id.* Defendant testified at the evidentiary hearing that he wanted his counsel to be present at the polygraph examination, and called his office, but was told by his secretary that counsel had instructed defendant to proceed with the polygraph examination. Moreover, defendant challenged the admissibility of the statement on the ground that he believed that it was made during the course of a polygraph examination. *Id.* at 277-278.

Under the circumstances of this case, we cannot conclude that defendant knowingly and voluntarily waived his right to counsel with respect to the questioning that occurred after his polygraph examination. Accordingly, we conclude that defense counsel erred by not moving to suppress defendant's post-polygraph statements, and by not objecting to Lock's testimony concerning the statements at trial.

Nonetheless, defendant has not argued or otherwise shown that he was prejudiced by defense counsel's error. We agree with the trial court that, in light of the other evidence presented at trial that the victim sustained a serious injury during an assault, defendant has not shown a reasonable probability that, but for defense counsel's error, the result of the proceedings would have been different. *Toma*, supra at 302-303; *Stanaway*, supra at 687-688. Thus, defendant has failed to establish that he was denied the effective assistance of counsel.

Defendant next argues that his sentence is not proportionate to the circumstances surrounding the offense and the offender. We disagree. We review sentencing decisions under an abuse of discretion standard. *People v Milbourn*, 435 Mich 630, 635-636; 461 NW2d 1 (1990). A sentence constitutes an abuse of the trial court's discretion if it violates the principle

¹ *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

of proportionality. The principle of proportionality requires sentences to be “proportionate to the seriousness of the circumstances surrounding the offense and the offender.” *Id.* at 636.

The trial court did not abuse its discretion in sentencing defendant as an habitual offender to term of ten to fifteen years’ imprisonment. The circumstances of the offense, considered in conjunction with defendant’s prior criminal record and the fact that defendant committed the instant offense while on parole, leads to the conclusion that defendant is unable to conform his conduct to the requirements of the law. *People v Hansford (After Remand)*, 454 Mich 320, 326; 562 NW2d 460 (1997). Thus, we find no error

We also reject defendant’s claim that his conviction of assault with intent to do great bodily harm less than murder was not supported by sufficient evidence or was against the great weight of the evidence. The test for determining the sufficiency of evidence in a criminal case is whether the evidence, viewed in a light most favorable to the people, would warrant a reasonable juror in finding guilt beyond a reasonable doubt. *People v Nowack*, 462 Mich 392, 399; ___ NW2d ___ (2000); *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748, amended 441 Mich 1201 (1992). A new trial based on the weight of the evidence should be granted only where the evidence preponderates heavily against the verdict and a serious miscarriage of justice would otherwise result. *People v Lemmon*, 456 Mich 625, 642; 576 NW2d 129 (1998).

The elements of assault with intent to do great bodily harm less than murder are 1) an attempt or threat with force or violence to do corporal harm to another (an assault), and 2) with the intent to do great bodily harm less than murder. *People v Parcha*, 227 Mich App 236, 239; 575 NW2d 316 (1997); *People v Harrington*, 194 Mich App 424, 428; 487 NW2d 479 (1992). A dangerous weapon is not required to establish an assault with intent to commit great bodily harm, but rather, even an assault with “bare hands” may suffice to establish a conviction for assault with intent to do great bodily harm less than murder. *People v VanDiver*, 80 Mich App 352, 356; 263 NW2d 370 (1977).

Here, the prosecutor presented evidence that defendant went to the victim’s house, removed a tire iron or crow bar from the trunk of his car, confronted the victim, and then struck the victim in the face, causing serious injury to the victim’s eye. Viewed most favorably to the prosecution, the evidence was sufficient to enable a rational trier of fact to find beyond a reasonable doubt that defendant assaulted the victim with the intent to cause great bodily harm. Furthermore, defendant’s conviction is not contrary to the great weight of the evidence.

Finally, the trial court properly rejected defendant’s request for an instruction on the misdemeanor offense of simple assault. “Whenever an adequate request for an appropriate misdemeanor instruction is supported by a rational view of the evidence adduced at trial, the trial judge shall give the requested instruction unless to do so would result in violation of due process, undue confusion, or some other injustice.” *People v Stephens*, 416 Mich 252, 255; 330 NW2d 675 (1982). Here, the evidence did not support the giving of a simple assault instruction where there was undisputed medical evidence that the victim had suffered a serious injury. Moreover,

the record does not support defendant's claim that the jury was confused by the standard jury instructions when returning its verdict.

Affirmed.

/s/ Kathleen Jansen

/s/ Martin M. Doctoroff